

Arbitration in Russia—what you need to know

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Arbitration analysis: Dmitry Ivanov, partner in the Moscow office of Morgan Lewis, provides a quick guide to arbitration in Russia and discusses recent reforms, including arbitral institution accreditation.

Russian arbitration—the legislative framework

Russian arbitration law is comprised of distinct legislation on domestic and international arbitration.

Domestic arbitration is regulated by Federal Law No 382-FZ ‘On Arbitration (Arbitral proceeding) in the Russian Federation’ of 29 December 2015 (Arbitration Law), while international arbitration is regulated by Law No 5338-1 ‘On International Commercial Arbitration’ of 7 July 1993 (ICA Law). Both laws were substantially influenced by the UNCITRAL Model Law dated 1985 (with 2006 amendments) as well as by international principles and guidelines.

Russian arbitration law was substantially amended and revised by the 2015 reforms, which comprised a new Arbitration Law (No 382-FZ) and an associated law amending various existing pieces of legislation (No 409-FZ), both enacted on 29 December 2015). The amended legislation came into force on 1 November 2017, therefore the reforms are still a hot topic.

The principal change concerned accreditation of the permanent arbitration institutions by the Russian government. Only arbitral institutions which successfully obtained accreditation can be considered ‘permanent arbitration institutions’ and therefore consider a specific range of disputes and benefit from certain rights. As of today, only two permanent arbitration institutions (the Russian Arbitration Center at the Institute of Modern Arbitration (the Russian Arbitration Center) and the Arbitration Center at the Russian Union of Industrialists and Entrepreneurs) in addition to two others specifically admitted by law (the International Commercial Arbitration Court and the Maritime Arbitration Commission—both at the Chamber of Commerce and Industry of the Russian Federation) have received accreditation.

Prevailing court practice currently arguably indicates that arbitration agreements referring disputes to an arbitral institution which failed to obtain accreditation by 1 November 2017 will be considered unenforceable (see, for instance, Resolution of the Supreme Court dated 22.01.2018 on case No A40-251666/2016); Resolution of the Supreme Court dated 16.11.2017 on case No A40-190431/2016; Resolution of the Commercial Court for Moscow Circuit dated 06.02.2018 No F05-21491/2017 on case No A40-143238/17).

Note: Russian judgments referred to in this article are not reported by LexisNexis UK.

Russian arbitration—the key concepts

Arbitration agreement

In order to refer the disputes to arbitration, the parties need to agree on an arbitration clause (prior to the dispute or once it has arisen).

Both the Arbitration Law and the ICA Law require that an arbitration agreement must be in written form or by exchange of emails (Article 7 of the Arbitration Law, Article 7 of the ICA Law). An arbitration agreement regarding corporate disputes can also be incorporated in the charter or articles of associations if adopted unanimously by shareholders (this does not apply to public joint stock companies, (Article 7, Paragraph 7 of the Arbitration Law).

Another option is to agree to arbitration by an exchange of procedural documents during the arbitration. As a general rule, an arbitration agreement cannot bind third parties which are not parties to it. Though the arbitration agreement may provide for the disputes resolution by institutional arbitration centres or by ad hoc arbitrations, in practice sometimes Russian courts treat ad hoc arbitrations very sceptically and interpret them as agreements where parties failed to agree on an arbitration forum (for instance, see Resolution of the Commercial Court for Moscow Circuit dated 07.05.2018 and the Resolution of the Ninth Commercial Appeal court dated 09.02.2018 on case No A40-130828/16 where, among other reasons, the court indicated that the UN-CITRAL arbitration in London clause did not specify a particular arbitration institution in London).

Arbitrability

Certain disputes in Russia cannot be referred to arbitration. The general principle is that only civil matters arising out of contractual obligations or tort are arbitrable. If there is a public element in the dispute (such as state registration involved), such dispute is likely to be non-arbitrable, though the overall rules are very complex and the answer would depend on multiple facts.

The following disputes, however, cannot be resolved by arbitration (the below list is illustrative, but not exhaustive):

- antitrust disputes
- insolvency and bankruptcy-related disputes
- corporate disputes in relation to 'strategic companies' (ie companies having particular importance to the defence or public security in Russia under the Foreign Strategic Investment Law and Foreign Investment Law) in Russia
- disputes arising out of state procurement contracts

The following disputes, though, can be resolved by arbitration (with in certain circumstances):

- disputes involving state registration (which has been one of the most controversial subjects over several years);
- family and inheritance law disputes in relation to shares of companies, etc.

The arbitration reforms of 2015 established that the corporate disputes are generally arbitrable, but with certain exceptions and supplemental requirements.

Arbitrators

The arbitral tribunal is usually appointed according to the parties' agreement or chosen institutional rules. However, in the case of *ad hoc* arbitration when the parties have not agreed on an appointment procedure, both the Arbitration Law and ICA Law take the same approach to tribunal constitution and appointment of

arbitrators (Article 11 of the Arbitration Law, Article 11 of the ICA Law). If three arbitrators are to be appointed, the claimant and respondent each appoint one arbitrator, and the two selected arbitrators appoint the presiding arbitrator. If one of the parties as well as selected arbitrators fail to appoint an arbitrator within 30 days, the appointment is made upon the request of any party to the state court. The same principle will apply in case of consideration of a dispute by a sole arbitrator. The parties also have the right (unless they specifically excluded it by agreement, pursuant to Article 11, Paragraph 4 of the Arbitration Law) to refer to the state court for support in the tribunal's formation.

The arbitrators can be challenged on the grounds of impartiality or failure to meet eligibility criteria (required under agreement or applicable law). The parties may challenge an arbitrator within 15 days of the appointment or within 15 days of when they became aware of any circumstance giving grounds for challenge (Article 13 of the Arbitration Law, Article 13 of the ICA Law).

Conduct of proceedings

The arbitration is generally commenced once the respondent receives the statement of claim (Article 23 of the Arbitration Law, Article 21 of the ICA Law), but arbitral institutions often indicate other milestone events for the commencement of arbitration. For example, the Rules of International Commercial Arbitration of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Russia (ICAC) state that the arbitration commences when the statement of claim is received by ICAC (Paragraph 2 of the ICAC Rules).

A jurisdictional objection must be raised before making any submissions on the merits of the claim (Article 16 of the Arbitration Law, Article 16 of the ICA Law). The arbitral tribunal may rule on its jurisdiction as a preliminary matter, or in an award on the merits.

Russian state courts have substantial powers to assist arbitration proceedings (which can be limited by the parties' express agreement), for example: 1) an order on interim measures; 2) assist the arbitral tribunal in taking evidence; 3) appoint or challenge an arbitrator; 4) challenge an interim arbitration ruling on jurisdiction of the tribunal; 5) setting aside the award; 6) enforcement of the award.

Interim measures

According to Arbitration Law and ICA Law, unless the parties agree otherwise, the arbitral tribunal may at the request of a party, grant interim measures that it considers appropriate (Article 17 of the Arbitration Law, Article 17 of the ICA Law). The laws do not provide any specific measures that might be imposed by the tribunal. The arbitral tribunal may require either party to provide counter-security in connection with such measures (Article 17 of the Law on Arbitration, Article 17 of the ICA Law).

Orders of domestic and foreign arbitral tribunals on interim measures remain non-enforceable in Russia (for example, Ruling of the Supreme Court of the Russian Federation dated 19 January 2015 in case No 307-ES14-3604, A21-9806/2013), unless such order is part of a partial arbitral award. Another possible approach could be to apply to the state court for the same measures and to refer to the relevant interim order issued by the tribunal. Interim measures could be ordered upon the request of a party by the state court at the location of the arbitral tribunal, or at the location of another party or its assets. The application for interim measures must be considered within one day by the judge (Article 90 and Article 93 of the Arbitrazh Procedure Code).

Furthermore, the interim measures can be taken by the arbitral institute prior to the constitution of the arbitral tribunal if the arbitral institution is empowered to do so by its rules.

Challenging and enforcing awards

Once the award is rendered the party has the right to recognise and enforce it by applying to the state court at the place of the debtor (or its assets') location. If there are no grounds for declining enforcement, the court will issue a writ of execution which can be provided to banks or bailiffs.

Similarly, if a party is not satisfied with the arbitral award it has the right to challenge it in the state court within 3 months from its issuance in writing (Article 40 of the Law on Arbitration, Article 34 of the ICA Law). This being said, the parties to arbitration administered by a permanent arbitration institute may agree that the award will be binding and contract out the right to challenge it.

Grounds to challenge arbitral awards are similar to grounds for denial of enforcement (Article 233 of the Arbitrazh Procedure Code) and correspond to the provisions of the New York Convention 1958:

- a party to the arbitration agreement was not fully legally capable
- arbitration agreement was invalid under applicable law
- the award is granted in a dispute not covered by arbitration agreement
- composition of the tribunal or procedure contradicted the parties' agreement or applicable law
- the party was not notified on the appointment of the arbitrators or was unable to provide its arguments

Further, a Russian court may set aside (or deny enforcement of) an award if the subject matter of dispute cannot be resolved by arbitration according to the Russian law or such enforcement would contradict to public policy.

Summary

The Russian arbitration reforms of 2015 described above have been a most important subject of debate, as they substantially altered the landscape for commercial arbitration in Russia, both domestic and international.

The reforms were designed, inter alia, to make arbitration in Russia more attractive, and to address the widespread negative practice of 'pocket arbitration courts' (where disputes were being submitted to private organisations established by one of parties to the agreement).

However, the key novelty of the reform, mandated 'accreditation' by the Russian government of all permanent arbitration institutions, is to administer arbitration in Russia as institutional arbitration. Failure to obtain such permit entails treatment of any awards issued under the rules of such institution as ad hoc and arguably renders arbitration clauses unenforceable.

The same regime obligation is imposed on foreign institutions that may administer arbitrations seated in Russia (and corporate disputes in relation to Russian legal entities may only be arbitrated with a seat in Russia). This has already resulted in a number of issues for the parties and courts and in hot debates in the legal community due to many issues that have arisen in practice of the former arbitration institutions, as well as with the concluded arbitration agreements and their enforceability.

In order to be prepared for arbitration proceedings conducted in Russia (or for an arbitration with subsequent enforcement prospects in Russia), the following key points would be extremely important to consider:

- what the arbitration agreement says about the seat or forum?
- if the seat or forum is in Russia, does the agreement refer to an existing arbitration center?

- could the subject matter of a dispute potentially be qualified as a corporate dispute under Russian law?
- does the arbitration agreement provide that the award will be final and binding?
- does the arbitration agreement exclude the right of parties to revert to state courts for support in the formation of the tribunal or challenge of arbitrators?

The above points may be relevant since if: (i) both the seat and forum are abroad there will likely be very few Russian law elements which can apply; (ii) the forum is abroad, but the seat is in Russia—Russian arbitration laws will apply to the procedure; and (iii) if only the forum is in Russia but the seat is abroad—it will be important to ascertain that the arbitration institution still exists for the arbitration clause to be operative. Furthermore, since special rules apply to arbitrations related to corporate disputes of Russian legal entities, such subject matter of the dispute will have impact on legal analysis of arbitrability in a particular forum. Finally, in having a Russian-seated arbitration in a permanent arbitration institution parties may contract out the right to appeal the award, as well as right of each party to refer to state courts for assistance in the conduct of arbitration for certain matters.

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